

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**PATSY LEVANG, CHERYL TUCK-SMITH, SUSAN JENNINGS, MARGO KNORR, KAREN POPE, and ANN WITT,**

*Plaintiffs,*

V.

**KAPPA KAPPA GAMMA FRATERNITY,  
et al.**

*Defendants.*

Case No. 2:24-cv-00316-MHW-KAJ

Judge Michael H. Watson

Magistrate Judge Kimberly A. Jolson

## PLAINTIFFS' NOTICE OF FILING TRANSCRIPT

!

Please take Notice that the Plaintiffs are hereby filing the transcript of oral argument in *Westenbroek v. Kappa Kappa Gamma Fraternity*, 2024 WL 2954705 (10th Cir. 2024), held May 14, 2024. The transcript is attached as Exhibit A to this Notice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Notice was served on all counsel of record via the Court's electronic filing system this 2<sup>nd</sup> day of August, 2024.

/s/Angela M. Lavin  
One of the attorneys for the Plaintiffs

1 UNITED STATES COURT OF APPEALS

2 FOR THE TENTH CIRCUIT

3 -----  
4 No. 23-8065  
5 -----

6 JAYLYN WESTENBROEK; HANNAH HOLTMEIER; ALLISON  
7 COGHAN; GRACE CHOATE; MADELINE RAMAR; MEGAN  
8 KOSAR, on behalf of themselves and derivatively  
9 on behalf of KAPPA KAPPA GAMMA FRANTERNITY,  
10 Plaintiff-Appellants,

11 v.

12 KAPPA KAPPA GAMMA FRATERNITY, an Ohio non-profit  
13 corporation, as Nominal Defendant and as Direct  
14 Defendant; MARY PAT ROONEY, President of the  
15 Fraternity Council of KAPPA KAPPA GAMMA  
16 FRATERNITY, in her official capacity; KAPPA KAPPA  
17 GAMMA BUILDING CO., a Wyoming non-profit  
18 corporation,  
19 Defendants-Appellees,  
20 and  
21 ARTEMIS LANGFORD,  
22 Defendant.  
23 -----  
24  
25

1 WOMEN'S DECLARATION INTERNATIONAL USA; OVER 450  
2 KAPPA KAPPA GAMMA ALUMNAE; WOMEN'S LIBERATION  
3 FRONT; NATIONAL PANHELLENIC CONFERENCE; NATHENIEL  
4 R. JONES CENTER FOR RACE, GENDER, AND SOCIAL  
5 JUSTICE; THE NATIONAL CENTER FOR TRANSGENDER  
6 EQUALITY; THE WOMANS CITY CLUB OF GREATER  
7 CINCINNATI; JIM OBERGEFELL; AMERICAN CIVIL  
8 LIBERTIES UNION OF OHIO FOUNDATION.

9 Amici Curiae.

10 -----

11  
12 Oral Argument

13 May 14, 2024  
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21 B E F O R E:

22 HON. MICHAEL R. MURPHY

23 HON. CAROLYN B. MCHUGH

24 HON. RICHARD E. N. FEDERICO

25 Circuit Judges

1 A P P E A R A N C E S:

2

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1 P R O C E E D I N G S

2 HON. CAROLYN MCHUGH:238065, Westenbroek  
3 v. Kappa Kappa Gamma. You can approach the  
4 podium when you're ready.

5 MS. MAILMAN: Good morning, Your  
6 Honors, and may it please the Court. May Mailman  
7 on behalf of Appellants, and I hope to save three  
8 minutes for rebuttal. The issue in this appeal  
9 is actually quite narrow. This case is at a  
10 motion to dismiss.

11 The question before the District Court  
12 and this Court is not the interpretation of  
13 woman. The question is whether Plaintiffs  
14 plausibly allege a breach of fiduciary duty. And  
15 we do. The District Court reached the opposite  
16 conclusion only by ignoring our well-pled facts  
17 and by importing inapplicable legal principles.

18 The decision must be reversed. I want  
19 to start by addressing the relevant allegations  
20 in our complaints. The Plaintiffs allege that  
21 the Directors of Kappa Kappa Gamma unilaterally  
22 changed the nature of the organization by adding  
23 a category of members.

24 Most importantly, the complaint alleges  
25 that the Directors did this in bad faith. They -

1 - the complaint alleges that the Directors dodged  
2 an honest conversation with the members by  
3 burying language in areas unlikely to be policed  
4 as a change to membership. And when the women in  
5 the Wyoming chapter faced harm from the change  
6 being implemented, they again avoided a good  
7 faith conversation and applied pressure to ensure  
8 unquestioned acceptance.

9 HON. CAROLYN MCHUGH: Let me interrupt.  
10 I have a preliminary question that goes to  
11 whether we have jurisdiction to hear this case at  
12 all. Obviously, we have to have a final decision  
13 from the District Court before we can exercise  
14 subject matter jurisdiction.

15 Here the District Court dismissed but  
16 gave very specific instructions on how you could  
17 fix your complaint and re-file. If we were to  
18 look at the intent of the District Court in  
19 determining whether or not the District Court  
20 thought it was a final decision, it seems to me  
21 it's not final. How do you respond to that?

22 MS. MAILMAN: Well, a dismissal is  
23 considered final when it goes to the merits of  
24 the Plaintiff's complaint rather than a  
25 procedural issue that the Plaintiffs can be

1 expected to fix. And so, the footnote that the  
2 District Court, I don't think indicates that his  
3 decision had anything to do, not with the merits,  
4 if this was a procedural issue, it was if you're  
5 allowed to re-file, because they've already filed  
6 their first amendment complaint.

7 But if you are allowed to, I hope that  
8 you do a better job of writing it, basically.  
9 Not that there's anything that the Plaintiffs can  
10 fix. So, what the Plaintiffs allege is that  
11 there is a promise that's been broken. The  
12 District Court said there is no such promise, and  
13 even if there was, I wouldn't be able to do  
14 anything regardless.

15 That goes to the merits of the  
16 complaint. There would be no way to write the  
17 complaint around that merits decision. Also, I  
18 think another practical consideration is, are  
19 there pieces of this case that are living in the  
20 District Court that might spring to life at any  
21 moment?

22 Is this going to lead to piecemeal  
23 appeals? And no, there's nothing remaining at  
24 the District Court --

25 HON. MICHAEL MURPHY: Wait a minute.



1 You did not appeal the contract or tort claim,  
2 correct?

3 MS. MAILMAN: Correct.

4 HON. MICHAEL MURPHY: So, those are  
5 remaining in the District Court, having been  
6 dismissed without prejudice. So, think of this  
7 hypothetical. You lose here on the derivative  
8 claim and the direct claim. You go back to the  
9 District Court and say well, I still have my  
10 contract and my tort claims, because they were  
11 dismissed without prejudice.

12 So, I'm going to amend, as was  
13 suggested by the District Court in its footnote.  
14 That's piecemeal litigation.

15 MS. MAILMAN: Well, there's no -- I  
16 guess the District Court didn't say that this  
17 could be amended. In the contract, all of these  
18 claims are wrapped up in the --

19 HON. MICHAEL MURPHY: Wait. It said  
20 without prejudice. And it talks about what you  
21 can do when you -- if you choose to amend.

22 MS. MAILMAN: But there's no way to fix  
23 the merits. So the contract claim --

24 HON. CAROLYN MCHUGH: And it didn't just  
25 dismiss without prejudice, it denied a motion

1 asking that it be dismissed with prejudice, which  
2 --

3 MS. MAILMAN: But only --

4 HON. CAROLYN MCHUGH: -- kind of is an  
5 exclamation point.

6 MS. MAILMAN: But I think that's  
7 separate from what the Moya case said, is that  
8 where there's a request to leave to amend and  
9 that that's granted -- that that is something  
10 that's not appealable. But here, the only reason  
11 the District Court said that they -- that he  
12 wasn't going to grant this with prejudice is  
13 because the Defendants didn't argue that  
14 amendment would be futile.

15 So, he didn't even consider it. He  
16 didn't say that you could re-file. He just said  
17 there isn't futility been alleged here, so I'm  
18 just not even going to consider it. It was not a  
19 basis for the decision.

20 HON. MICHAEL MURPHY: But don't you  
21 agree that if you lose on the derivative claim  
22 and you lose on the direct claim, the -- you can  
23 go back to District Court and amend.

24 MS. MAILMAN: The -- I think the  
25 problem is --

1 HON. MICHAEL MURPHY: Just -- can you  
2 do that?

3 MS. MAILMAN: Not around the merits  
4 determination.

5 HON. MICHAEL MURPHY: Can you amend the  
6 tort and/or the contract claim?

7 MS. MAILMAN: I don't think there'd be  
8 a good faith basis to do so.

9 HON. MICHAEL MURPHY: Can you do that?  
10 Are you authorized to do that by the Order of the  
11 District Court Judge?

12 MS. MAILMAN: We could ask. We could  
13 certainly ask to re-file. But it would -- the  
14 problem here, and this goes to the practical  
15 consideration of is it on the merits, is that all  
16 of these contract claims, every single one of the  
17 claims, boils down to whether there's been a  
18 certain promise made in the bylaws, and whether  
19 that promise was broken.

20 And so, if we lose here, then in a  
21 sense, there'd be no way to get around that  
22 determination. There -- I couldn't figure out a  
23 way --

24 HON. MICHAEL MURPHY: What if you  
25 decide to amend the claim on the contract

1 regarding housing?

2 MS. MAILMAN: Again, that contract goes  
3 to the bylaws, and whether there was a promise in  
4 the bylaws. So, I guess -- we could try. We  
5 could ask. But there would be a difficult merits  
6 determination to overcome.

7 HON. RICHARD FEDERICO: Counsel, can I  
8 read your briefings to conclude that you are  
9 abandoning the contract and tort claim for all  
10 time, and also really have no note -- or no  
11 intent to -- and in fact, may be disclaiming any  
12 rights you have to amend counts one and four as  
13 well?

14 MS. MAILMAN: Right, so it's not raised  
15 in our opening brief, and so we've forfeited that  
16 claim.

17 HON. RICHARD FEDERICO: What about  
18 counts one and four though? You have been  
19 granted leave to amend those as well. I  
20 understand you'd argue to say there's nothing we  
21 can do to amend those claims to potentially make  
22 them viable, consistent with the District Court  
23 orders. Or are you disclaiming any rights you  
24 may have to amendment?

25 MS. MAILMAN: Well, we haven't been

1 given a right to amend that. We've been -- the  
2 claim has been dismissed, admittedly without  
3 prejudice.

4 HON. RICHARD FEDERICO: Without  
5 prejudice, and Footnote 67 at the District Court  
6 order is pretty clear that if you want to amend,  
7 here are the guidelines that the District Court  
8 is offering to you. A lifeline in how to do  
9 this.

10 MS. MAILMAN: Right, and so we could  
11 write it better. I agree. We could follow that  
12 footnote and write it better. The problem is, we  
13 couldn't write it to get around the determination  
14 on the merit.

15 So, we could write it cleaner and  
16 prettier and nicer. Just not to fix the problem  
17 that exists here. And so, that's what I really  
18 want to address, is what is that merits  
19 determination that we really can't get around?  
20 And here, the District Court, instead of  
21 assessing the elements of a breach of fiduciary  
22 duty claim, said that he was unable to review  
23 that claim because of not -- inner --  
24 noninterference principles.

25 But the problem is, there is no non-

1 interference principle that forbids Courts from  
2 looking into bad faith breaches of fiduciary  
3 duty. So, that really is the question. Is are  
4 we in bad faith land? Or are we in good faith  
5 disagreements about the bylaws? And so, it's  
6 only by transforming the complaint into this is a  
7 good faith disagreement that you have that  
8 deference principle.

9 But the complaint doesn't allege that.  
10 The complaint alleges that there was a change, so  
11 this is paragraph seven, paragraph 57, paragraph  
12 58. That say there was a change to the bylaws,  
13 that this was an alteration of the membership  
14 requirement, that they added a category of  
15 members, and that they did this in bad faith.

16 So that when the women in Wyoming said  
17 that they had some harm arising from this change,  
18 instead of having a conversation about that, they  
19 said we are going to make the vote not anonymous,  
20 even though it needs to be. That women are going  
21 to be threatened with dismissal.

22 HON. CAROLYN MCHUGH: In looking at your  
23 arguments below, I don't see any argument about  
24 anonymity. When you're talking about the voting  
25 requirements, that's not there.

1 MS. MAILMAN: And the -- sorry, so  
2 places in the complaint or --

3 HON. CAROLYN MCHUGH: I'm talking about  
4 when you raised it in the District Court, and  
5 when you raised it with Kappa Kappa Gamma.

6 MS. MAILMAN: Okay. So, I guess a  
7 couple of pieces. So one, to the futility/demand  
8 argument, I think there's two things here. So,  
9 one you could see the request -- the various  
10 requests to the Kappa Directors as a demand. Or  
11 whether that's futile. So, we would say both.

12 One, that there was an actual demand  
13 made, and in that demand letter and that's at 259  
14 and 60 of volume one of the Appendix. That we  
15 specifically do raise that there were illegal  
16 voting procedures here.

17 HON. CAROLYN MCHUGH: But you never say,  
18 and they actually -- the attorneys for the  
19 fraternity write back and say could you please  
20 point us to the particular provisions or bylaws  
21 or procedures that we've -- that you say that we  
22 have violated, and you don't respond at all.

23 MS. MAILMAN: And I think that that may  
24 be what --

25 HON. CAROLYN MCHUGH: It's hard to show

1     futility if they were at -- they were trying to  
2     engage and you didn't respond.

3             MS. MAILMAN: Well we -- I guess we  
4     don't see a good faith engagement here. Because  
5     the illegal voting procedures had been raised  
6     with them multiple times, and our allegations in  
7     our complaint is that they are behind it. And  
8     so, that shows antagonistic nature, that shows  
9     that their minds are closed to argument.

10            Because if they're the ones behind it,  
11     if they are saying that we're going to now use a  
12     Google poll rather than Omega Recruit, if they  
13     are saying that some of the members need to go  
14     through sort of re-training to be better Kappa  
15     members, and at that -- if they're behind this,  
16     then of course they're antagonistic.

17            And I think that that -- I mean, that's  
18     what the District Court said. Of course.

19            HON. CAROLYN MCHUGH: But you didn't  
20     ever raise either when the District Court or with  
21     Kappa Kappa Gamma, your allegations about alleged  
22     election violations. It's not in your letter,  
23     it's not in the argument to the District Court,  
24     it springs fully formed and new on appeal.

25            MS. MAILMAN: But -- I guess I disagree



1 with that in the sense that there was a specific  
2 -- in the letter to the Kappa Directors, it says  
3 that voting is supposed to be anonymous and that  
4 voting here was not anonymous.

5 HON. CAROLYN MCHUGH: In your complaint?

6 MS. MAILMAN: And in the complaint,  
7 absolutely. So, the lack of secret nature was at  
8 paragraph 12, paragraph 106, and paragraph 134.

9 HON. CAROLYN MCHUGH: But it's too late  
10 in your complaint if you didn't make an effort to  
11 raise that complaint to show that you have a  
12 right to bring a derivative complaint because  
13 they -- it would have been futile or they were  
14 not interested in responding. You have to  
15 actually bring it to their attention.

16 And in fact, the District Court never  
17 even addressed the election violation theory,  
18 because it didn't even know it was before it.

19 MS. MAILMAN: Well, even assuming that  
20 that is the case, there still is a derivative  
21 claim remaining there about the violation of the  
22 bylaws in bad faith. So, even assuming that, we  
23 still have a claim.

24 But, the District Court did  
25 specifically mention the letter as the reason how

1 we know that these Directors were antagonistic  
2 and that letter leads with a complaint about the  
3 illegal voting procedures. And that the request  
4 in the letter was for a valid vote in accordance  
5 with the bylaws, and I hope to reserve. Yup. Go  
6 ahead.

7 HON. MICHAEL MURPHY: You allege claims  
8 against only one Defendant -- what, two  
9 Defendants that are not nominal. Correct? And  
10 one is the real estate issue.

11 MS. MAILMAN: Right.

12 HON. MICHAEL MURPHY: Okay. So, you  
13 asked for injunctive relief, correct?

14 MS. MAILMAN: Correct.

15 HON. MICHAEL MURPHY: And how -- Rooney  
16 cannot give you injunctive relief. She's one  
17 individual of, I think a council of eight, that  
18 it takes a vote of six to do something. So, she  
19 has no authority. So, how could -- if you get an  
20 injunction against her, isn't it meaningless?

21 MS. MAILMAN: Declaratory relief I  
22 think would be meaningful in that circumstance.  
23 And I think there's still monetary relief that  
24 we're seeking for the organization, which has  
25 lost --

1 HON. MICHAEL MURPHY: Against Rooney?

2 MS. MAILMAN: Against Rooney.

3 HON. MICHAEL MURPHY: Even though she  
4 has no power to act alone.

5 MS. MAILMAN: No, but through  
6 declaratory relief that the Board cannot  
7 unilaterally amend the bylaws, I think that the  
8 declaratory relief would apply by its nature --

9 HON. MICHAEL MURPHY: Okay, are you  
10 saying then that you may be able to survive on  
11 your direct claim, but not your derivative claim,  
12 because that's on behalf of the Court -- of the  
13 entity?

14 MS. MAILMAN: I think a declaratory  
15 judgement that Rooney may not take certain  
16 actions, or that this is what the bylaws require  
17 would, unless everyone else wants to go then and  
18 violate it separately and then get claimed  
19 against that.

20 HON. MICHAEL MURPHY: But what good is  
21 any relief? Injunctive or declaratory if the  
22 only non-nominal Defendant is a single individual  
23 that is on a board of eight that requires six  
24 votes to do anything? What meaning does any  
25 relief have?

1 MS. MAILMAN: So, the -- an injunctive  
2 relief against one person would still lead to the  
3 result that the Plaintiffs are seeking here.  
4 Because we would hope that the rest of the Board  
5 --

6 HON. MICHAEL MURPHY: Well, we're not  
7 talking about hopes and aspirations here. That  
8 means, according to your view, that the other  
9 seven members of the council would be -- have no  
10 meaning. I mean, okay. So, you can clam up  
11 Rooney, but what about the other seven?

12 MS. MAILMAN: They're still not free to  
13 violate the bylaws and violate this Court's  
14 order.

15 HON. MICHAEL MURPHY: But that goes to  
16 the merits. I'm talking about whether or not you  
17 can bring this suit against one nominal  
18 Defendant. Excuse me, one non-nominal Defendant.

19 MS. MAILMAN: Well, at the very least,  
20 the monetary relief would still be there, and  
21 that's not just the direct claim, that's the  
22 derivative claim. The harm here is to the  
23 organization. The organization is the one that  
24 has lost donations, that has lost its reputation,  
25 and that has lost members.

1           Members have dropped. In fact, the  
2     house in Wyoming was not at capacity, and is at  
3     risk of closing because of that. So, still and  
4     ultimately, at the end of the day, the monetary  
5     relief would be sufficient.

6           HON. CAROLYN MCHUGH: And you're out of  
7     time.

8           MS. MCLAUGHLIN: May it please the  
9     Court. My name is Natalie McLaughlin, and it is  
10    my privilege to represent Kappa Kappa Gamma  
11    Fraternity, the President of its Fraternity  
12    Council, Mary Pat Rooney, and the Kappa Kappa  
13    Gamma Building Co. in this matter.

14           The District Court correctly dismissed  
15    this lawsuit, recognizing the right of an Ohio  
16    voluntary organization to not have a Federal  
17    Court interfere in its governance. There are  
18    three points Appellees seek to highlight for the  
19    Court today.

20           One, Kappa's governing documents  
21    explicitly grant Fraternity Council the duty to  
22    interpret Kappa's bylaws. Two, because Kappa is  
23    a voluntary organization, Kappa is entitled to  
24    judicial deference under Ohio law to interpret  
25    its own bylaws, and three, there is a presumption

1 under Ohio law that Kappa's Fraternity Council  
2 acted in good faith in accordance with their  
3 fiduciary obligations in interpreting Kappa's  
4 bylaws.

5 HON. CAROLYN MCHUGH: Before you jump  
6 into the merits, do we have jurisdiction to even  
7 hear this case? Is there a final judgement from  
8 the District Court when some of the claims were  
9 dismissed without prejudice?

10 MS. MCLAUGHLIN: So, we had raised this  
11 early with the District Courts disposition and  
12 the requirement of jurisdiction, and we certainly  
13 think this is a valid question for the Court to  
14 consider. And this is something that the Court  
15 will have to consider before getting to the  
16 merits.

17 HON. CAROLYN MCHUGH: And I'm asking you  
18 to weigh in on that consideration.

19 MS. MCLAUGHLIN: Yeah, so Appellants  
20 have -- we question the Court's jurisdiction, and  
21 that's why we raised it in a motion, and raised  
22 it again in our brief. Appellants have  
23 represented to the Court that they believe no  
24 amendment could cure any of their claims.

25 And we certainly do believe they have a

1 better understanding of what they are seeking to  
2 advance with regard to their derivative and their  
3 direct claims, so the Court does have the  
4 opportunity to consider whether it can take their  
5 representations to consider those claims.

6 We do believe that there has been an  
7 abandonment though, of their breach of contract  
8 in their tortious interference claims and not  
9 advancing those claims before the Court. But  
10 this Court will need to consider --

11 HON. CAROLYN MCHUGH: But, how could  
12 they advance those claims before the Court when  
13 they were dismissed without prejudice?

14 MS. MCLAUGHLIN: We believe those  
15 Courts had been abandoned by them, and not  
16 advancing them any further.

17 HON. CAROLYN MCHUGH: You -- so, you  
18 think they should have appealed the decision to  
19 dismiss them without prejudice, even though they  
20 would have had an opportunity to amend?

21 MS. MCLAUGHLIN: Well, they're -- they  
22 have represented to the Court that all of their  
23 claims are completely contingent on the  
24 determination by the District Court that the --  
25 that the -- Kappa has the ability to determine

1 its own bylaws and interpret their bylaws and  
2 interpret the term women.

3 And though we have represented to -- we  
4 have put forth for this Court early on in our  
5 motion and have raised it again in our briefing,  
6 that because of the Court's determination that  
7 that decision was without prejudice, that there  
8 is a jurisdictional question that this Court will  
9 have to determine.

10 And whether we had raised it or not,  
11 this Court would have to make that decision even  
12 sua sponte if we had not raised it, and so that  
13 is a decision for this Court to make. And we  
14 think that that is a fair question for this  
15 Court.

16 Now, they have asked this Court to take  
17 their representation that that is a question that  
18 they have said is a question that they cannot do  
19 anything to fix that claim, and we question that  
20 representation.

21 HON. MICHAEL MURPHY: So, I don't  
22 understand your answer.

23 MS. MCLAUGHLIN: Yeah, so we --

24 HON. MICHAEL MURPHY: Is it your  
25 position we do not have jurisdiction?



1 MS. MCLAUGHLIN: We do not believe they  
2 have jurisdiction.

3 HON. MICHAEL MURPHY: All right.

4 MS. MCLAUGHLIN: But they have asked  
5 this Court to take their representation at face  
6 value and find jurisdiction, yes.

7 HON. CAROLYN MCHUGH: Okay.

8 MS. MCLAUGHLIN: So, the term women is  
9 undefined in Kappa's bylaws, and that term women  
10 is not a term that has a singular definition.  
11 But everyone in this --

12 HON. CAROLYN MCHUGH: Well, I mean I  
13 think the argument comes down to you're -- the  
14 fraternity has the right to interpret its own  
15 bylaws and its policies.

16 MS. MCLAUGHLIN: Correct.

17 HON. CAROLYN MCHUGH: But the argument  
18 is, this isn't an interpretation, this is an  
19 amendment. And that woman has been expanded to  
20 include people who, when the fraternity was  
21 formed, would not have been considered women.  
22 Can you respond to that argument?

23 MS. MCLAUGHLIN: Certainly, certainly.  
24 So, the membership qualifications in the bylaws  
25 remain the same. There has been no amendment to

1 the bylaws. Which is that a member remains --  
2 must be a woman. Now, that qualification  
3 however, is undefined in the bylaws.

4 And Fraternity Council is explicitly  
5 given the duty, not even just the right, the duty  
6 in these standing rules to interpret terms in the  
7 bylaws, and that is what occurred here. Now, the  
8 issue here is whether Fraternity Council has the  
9 right to interpret the term women.

10 And it is not whether they have  
11 announced that term in the best form, but whether  
12 they have exercised the right to interpret that  
13 term, and that is what occurred here. And so,  
14 the term women is undefined in the bylaws, and  
15 that term women is not subject to a singular  
16 definition.

17 And everyone in this large and diverse  
18 organization of over 210,000 individuals does not  
19 interpret that term women in the same way. And  
20 Kappa's Fraternity Council are the volunteers of  
21 this organization who were elected to serve as  
22 the Board and given that duty in the standing  
23 rules to interpret the terms.

24 And what Appellants have asked the  
25 Court to do is to elevate their interpretation

1 above that of Fraternity Council, but what this  
2 Court should do is defer to Fraternity Council's  
3 interpretation, because that is what is required,  
4 both by Kappa's governing documents and Ohio law.

5 HON. CAROLYN MCHUGH: What if the  
6 interpretation of women was that it included cis-  
7 gender men? Would your same argument fly, that  
8 it's simply an interpretation and they have  
9 absolute right to interpret it in any way they  
10 want?

11 MS. MCLAUGHLIN: So, the principle  
12 under Ohio law, and Ohio law on this under -- is  
13 that judicial deference accorded to voluntary  
14 organizations in their interpretation and  
15 administration is a threshold issue that the  
16 Court must consider.

17 And what Ohio law holds in turning to  
18 the (indiscernible) case is that Courts must  
19 defer, and without direction or interference by  
20 the Courts, the right to adopt bylaws and  
21 interpret them and administer them is as sacred  
22 as the right to make them.

23 And the only time that a Court can step  
24 in is if they have to show that the  
25 interpretation is both unreasonable and

1 arbitrary. So, that particular interpretation is  
2 not before the Court today, and that is something  
3 that I do not have the research on or  
4 interpretations on cisgender men. But, what we  
5 would have to look at is is that interpretation  
6 unreasonable and arbitrary?

7 And here, what we have done for this  
8 Court is put forward many resources and many  
9 other sources, such as the National Panhellenic  
10 Conference, Federal Courts, other women's  
11 organizations, women's colleges, the Endocrine  
12 Society Guidelines, and dictionaries to show this  
13 Court, not to say that this is the correct  
14 interpretation, but to enable this Court to look  
15 at that and say, this interpretation is a  
16 reasonable and non-arbitrary interpretation.

17 And judicial deference only requires  
18 the Court to look at that and determine, is this  
19 a reasonable and non-arbitrary interpretation,  
20 and if so, then judicial deference is required  
21 per Ohio law.

22 HON. RICHARD FEDERICO: Counsel, how do  
23 you respond to the Appellant's argument, and  
24 again, you keep using the word interpretation,  
25 and their argument is there's no interpretation

1 here, it's legislation. And even the bylaws  
2 itself, when it says woman, period, when you're  
3 adding language and those who identify as women  
4 that you're creating a new category altogether.

5 MS. MCLAUGHLIN: Sure. So, the issue  
6 here is whether council has the right to  
7 interpret women. Not, again, whether they have  
8 announced that interpretation in the best form.  
9 So, nine years ago council had shared that the  
10 interpretation that membership was inclusive of  
11 individuals identifying as women, and we have  
12 certainly improved in nine years in how we might  
13 define and talk about gender identity.

14 But we cannot expect a volunteer board  
15 to communicate their interpretations as precisely  
16 as a legislator drafts a statute. Nor are they  
17 held to a statutory interpretation analysis. And  
18 what Kappa's governing documents do is they give  
19 counsel the right to interpret.

20 And in an artful announcement of an  
21 interpretation by a volunteer board does not  
22 warrant Court interference under Ohio law. Only  
23 an unreasonable and arbitrary interpretation  
24 does.

25 HON. RICHARD FEDERICO: But they're

1 alleging bad faith here, and the idea, as I  
2 understand it, is it's one thing for the board to  
3 interpret the bylaws in a way that determines  
4 eligibility criteria regarding things like GPA or  
5 let's say you want to admit someone who has good  
6 moral character.

7 Compared with, what is really the  
8 foundational issue for why this organization has  
9 existed for 150 years, that this is categorically  
10 different. Which I also understand they to say -  
11 - them to say that's why the Court getting  
12 involved in this one unique issue would not lead  
13 to the "waive of suits" about whether or not this  
14 person was admitted because their GPA was on the  
15 cusp or some other eligibility criteria. So,  
16 isn't this fundamentally different?

17 MS. MCLAUGHLIN: Well, that is  
18 speculation on that part, but we do not view that  
19 this issue is any different. Council exercises  
20 the authority -- there is no distinguishing  
21 factor in the standing rules that council has the  
22 ability to interpret certain terms and not other  
23 terms.

24 Women is unquestionably not defined.  
25 Women is also a term that unquestionably has

1 multiple definitions, and that they seek to  
2 distinguish this term versus other terms that  
3 council also exercises the right to interpret.

4 Certainly there are other terms, and  
5 you have called out some of them, that council  
6 also exercises their authority to interpret so  
7 that they seek to question the interpretation of  
8 this term, which is one that they take issue  
9 with.

10 Well again, Council has interpreted  
11 other things, such as how do they interpret  
12 regard for others and appreciation for the worth  
13 of all individuals? Well, Council has also set  
14 forth in their position statements that they  
15 interpret that to be -- they interpret that to  
16 mean they require candidates to be responsible  
17 citizens and contributing members of their  
18 communities.

19 That this interpretation is something  
20 that they take issue with does not give -- that  
21 this is something they disagree with does not  
22 divest Fraternity Council of both their right  
23 under the standing rules and the right under Ohio  
24 law to interpret that.

25 HON. RICHARD FEDERICO: But we're also

1 at the pleading stage, and they're alleging bad  
2 faith.

3 MS. MCLAUGHLIN: Mm hmm.

4 HON. RICHARD FEDERICO: And wouldn't  
5 that eviscerate any deference that the board  
6 would be entitled?

7 MS. MCLAUGHLIN: No. So, it is  
8 important to distinguish that under Ohio law,  
9 because this is a voluntary organization, there  
10 are two separate tasks that this Court needs to  
11 be aware of. The first is the judicial deference  
12 test.

13 And that is something that is only  
14 accorded to voluntary organizations. It is not  
15 something that is accorded to for-profit  
16 corporations under Ohio law. And judicial  
17 deference is the test that we set forth under  
18 Stibora and the other cases.

19 Under that judicial deference is  
20 accorded to the interpretation of governing  
21 documents. And that is a threshold issue for  
22 this Court to decide. The breach of fiduciary  
23 duty test is a second test, and that's for breach  
24 of fiduciary duty claims that could apply both  
25 for voluntary organizations and for-profit



1 corporations.

2 Moving beyond judicial deference, that  
3 is a separate test, and so if the Court were to  
4 determine, even if you were to find that their  
5 interpretation was unreasonable, you would still  
6 consider whether a breach of fiduciary duty claim  
7 is met.

8 And under that, they have to allege  
9 facts to establish a plausible claim for breach  
10 of fiduciary duty. Now, the -- now, what must be  
11 alleged again, is that there are facts to show  
12 plausibly that there has been bad faith on the  
13 part of Ms. Rooney. And that is more than just  
14 conclusory allegations. Actual facts, and here  
15 that has not been contended.

16 HON. CAROLYN MCHUGH: Well, isn't --  
17 what they allege, as I understand it, is that Ms.  
18 Rooney had an outcome that she wanted, and  
19 manipulated the voting process so that she could  
20 get that outcome.

21 I'm not saying that's what happened,  
22 I'm saying that's what's alleged. Isn't that  
23 enough of an allegation to support, at this  
24 stage, bad faith?

25 MS. MCLAUGHLIN: Reviewing the

1 complaint, that is not what is actually alleged.  
2 And so, certainly that is what they're briefing  
3 now attempts to allege. But again, the  
4 complaint, we have to look at what are the actual  
5 factual allegations as opposed to the conclusory  
6 allegations?

7 And what -- looking at the factual  
8 allegations here, the factual allegations and  
9 taking, again, there's very little alleged  
10 against Ms. Rooney. But taking the allegations  
11 against Fraternity Council to be what is alleged  
12 against her, the actual allegations against  
13 Fraternity Council, about when does Fraternity  
14 Council come into play, those are the allegations  
15 in paragraph 63, 93, 94, 141.

16 There are no allegations that  
17 Fraternity Council became aware of anything going  
18 on until actually after post-election, not in the  
19 membership selection. The complaints about  
20 Fraternity Council is that after Ms. Langford had  
21 been selected by the chapter, complaints were  
22 made that the Fraternity Council was made aware  
23 of this.

24 And what they failed to do was stop.  
25 They did not stop the induction. I see my time

1 is about to run short, may I finish this answer  
2 before --

3 HON. CAROLYN MCHUGH: Yes, and we gave  
4 your opposition two extra minutes, so I'm fine  
5 with that. But let me point you to paragraph  
6 163. By not only allowing, but also by endorsing  
7 and actively working to secure the membership of  
8 Langford, the Directors of the sorority have  
9 violated their duties of loyalty, care, and  
10 obedience compliant.

11 MS. MCLAUGHLIN: And certainly, and  
12 that is absolutely what we would -- we contend,  
13 is certainly a conclusory allegation. If you  
14 review the actual factual allegations here, and  
15 again, looking at allegations 63, 93, 94, and 141  
16 of the complaint, which allege the actual,  
17 specific facts of when did Fraternity Council  
18 even become aware of what was going on in the  
19 chapter of Wyoming.

20 What is specifically alleged regarding  
21 Ms. Langford is that complaints were made after  
22 she was elected, that this individual had been  
23 selected by the chapter, and they were made aware  
24 and what she -- and what they failed to do was  
25 stop the induction of Ms. Langford.

1 But, what they have also done is they  
2 have put forth the standing rules and the bylaws.  
3 And that allows the Court to rule -- to review  
4 what the actual process is for induction of  
5 members by Fraternity Council. And that is  
6 basically an automatic process.

7 The induction process is something that  
8 is required. The language that is for Fraternity  
9 Council is shall. And so, they shall induct  
10 anybody who meets those requirements. It is not  
11 a discretionary process.

12 HON. CAROLYN MCHUGH: And you are now  
13 over.

14 MS. MCLAUGHLIN: Thank you.

15 HON. MICHAEL MURPHY: Can I --

16 HON. CAROLYN MCHUGH: I'm sorry.

17 HON. MICHAEL MURPHY: I have a  
18 question. You invoked the concept of the  
19 fiduciary shield law of Wyoming as interpreted by  
20 this Court in Ten Mile Industrial Park, correct?

21 MS. MCLAUGHLIN: Correct.

22 HON. MICHAEL MURPHY: And if that's  
23 correct, that Ms. Rooney is shielded as a  
24 fiduciary under Wyoming law, there's nothing left  
25 but nominal Defendants, correct?

1 MS. MCLAUGHLIN: That is correct.

2 HON. MICHAEL MURPHY: And is that a  
3 basis alone to -- well, affirm the dismissal  
4 without prejudice?

5 MS. MCLAUGHLIN: That could be, yes.

6 HON. MICHAEL MURPHY: Thank you.

7 HON. CAROLYN MCHUGH: Thank you. Do you  
8 have anything further?

9 HON. MICHAEL MURPHY: Thank you.

10 HON. CAROLYN MCHUGH: Thank you. We  
11 will take this matter under advisement. We  
12 appreciate your argument today, and the briefing.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the  
foregoing transcript is a true and accurate  
record of the proceedings.

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Date: June 17, 2024

[106 - amici]

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[analysis - capacity]

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